tenant, brought the action against his landlords, the respondents, claiming damage and injunction for nuisance or trespass. Shortly following the filing of the writ he applied by notice of motion and obtained a temporary injunction, the effect of which was to restrain the respondents from continuing with their development work on that part of the land not occupied by the appellant but close to the house in which he lived. The respondents have in the meantime filed their respective defences and have also counter-claimed for damages. The appellant has filed his replies to the defences as well as his defences to the counter-claims. All these took place sometime in May, 1971.

In January, 1972, i.e. some seven months later, the respondents applied by summons in chambers to have the action dismissed for want of prosecution under O.36 of the Rules of the Supreme Court on the ground that the appellant failed to enter the action for trial within the time prescribed by the Rules.

The application was supported by affidavits in the usual form. The affidavit in reply filed by the appellant sought to put the blame for the delay on the lawyer's clerk who admitted in the affidavit that it was his fault for having mislaid the necessary papers and for having forgotten to file them in time. That in itself, of course, is not a valid excuse.

At the hearing of the application before B.T.H. Lee J. who granted the temporary injunction the court was informed that the entry of the action for trial has just been filed. That, of course, is beside the point. However, the matter was adjourned to March, 1972 to open court for arguments. In March nothing happened. In the meantime several affidavits were filed mainly by the appellant. The hearing took place and concluded in May, 1972 when judgment was reserved. In August, 1972 the learned judge delivered his judgment allowing the application in terms. That, however, was not the end for in October, 1972 the appellant pursuant to O.54 applied to have the matter further argued. This was granted. Before the hearing of further arguments more affidavits were filed. The court again reserved decision until January, 1973 when in another written judgment the learned judge confirmed his previous decision. As may be observed it took almost a year for the matter to be concluded.

After hearing arguments we dismissed the appeal indicating that we would give our reasons later.

On the affidavits before the court there was absolutely no valid excuse for the delay of seven months to enter the action for trial. *Prima facie* that was as good a ground as any for the court to exercise its discretion and dismiss the action for want of prosecution. However, the rule is that judicial discretion must be exercised in accordance with established principles. The relevant principles are well stated in *Allen* v. *Sir Alfred McAlpine & Sons Ltd.*[1] and the relevant passage of the judgment in that case appears in the written submissions as well as in the judgment of the court. Shortly put, there was a prolonged and inexcusable delay. It only remains for consideration whether such delay has prejudiced the respondents. It undoubtedly has. First, they were prevented by the temporary injunction from continuing with their development work on their own land. As owners they were clearly within their rights to develop the land. The temporary injunction was obtained without any evidence to prove nuisance or trespass. Delay in entering the action for trial means delay in providing the necessary proof. In this case the delay seems intentional and deliberate. There was clear evidence of such intention. We refer to the evidence of a letter dated May 9, 1972 from the appellant's solicitors, M/s Thomas & Co., to the magistrate which stated, *inter alia*, as follows:

"...In our view there is nothing to argue about the order of the High Court of which you should take judicial notice and is clearly binding on all the plaintiffs in the suit before the District Court. If you proceed with the case when the said order is in force you would, in our humble opinion, be acting in a manner discourteous to the High Court, if not contemptuous. So it is more than a question of jurisdiction."

The action before the District Court has nothing whatsoever to do with the appellant's action in the High Court. The former is a suit by the respondents to recover possession of that part of the land which was occupied by the appellant. By this letter it was clearly intended to mislead the magistrate into thinking that as long as the temporary injunction was in force the case in the District Court could not proceed. It was not only misleading but insolent to write to a presiding officer of a court of law and tell him under a veiled threat that to go on with the case would be acting in contempt of the High Court order. We are firmly of the view that in the circumstances of this case the court below has properly exercised its discretion.

Appeal dismissed.

Solicitors: *Thomas & Co.; Chan & Co.*

MOHAMAD SALLEH v. LAU SIOK KEE

[F.C. (Azmi L.P., Gill and Ali F.JJ.) December 13, 1973]
[Kuching — Federal Court Civil Appeal No. 21 of 1973]

Trust — Trust deed — Charge of land by trustees to secure loan — Order for sale of land — Right of beneficiary to question transaction — Whether beneficiary can seek to show that the loan is unenforceable under the Moneylenders Ordinance — Claim frivolous and vexatious.

In this case the trustees under a trust deed had charged certain land to the respondent. On failure to pay the balance of the loan, the respondent obtained an order to sell the charged land. The appellant, one of the beneficiaries, under the trust deed, applied for a declaration (a) against the trustees that they have no right or power to charge the land and (b) against the respondent that her claim was unenforceable under the Moneylenders Ordinance.

Held: (1) there was power to charge the trust property under the trust deed;

(2) as the appellant was not a party to the loan transaction or to the original action, he had no *locus standi* and no right to plead the Moneylenders Ordinance. The action was therefore vexatious and frivolous.

FEDERAL COURT.

T. O. Thomas for the appellant.

Ee Poh Teck for the respondent.

Ali F.J. (read by **Lee Hun Hoe Ag. C.J. (Borneo)**): We dismissed this appeal on the date of hearing and now give our reasons.

Mohamad Salleh bin Shaik Ahmed, Talib bin Sheik Ahmed, Zakiah binti Sheik Ahmed and Abdul Haddy bin Abdul Rahman are trustees under a trust deed. The appellant, Mohamad Salleh bin Shaik Ahmed, is one of the beneficiaries of the trust properties. Sometime in July, 1969 the trustees charged one of the trust properties, to wit a parcel of land described as Parcel 62, Section 26, Kuching Town Land District to the respondent, Lau Siok Kee (f) to secure a loan of $30,000. In January, 1971 when the balance of the said loan was not paid on due date the respondent/chargee applied by originating summons for an order to sell the charged land. The court ordered sale by public auction.

In February, 1972, the appellant issued a general writ of summons citing the respondent/chargee and the trustees as defendants. As against the trustees he asked for a declaration that they have no right or power under the trust deed to charge the land and that the charge as executed by them and registered in the land office is null and void. Alternatively, as against the respondent/chargee he sought a declaration that her claim arising from the loan transaction between her and the trustees is unenforceable under the Sarawak Moneylender's Ordinance. He asked for the order of sale to be set aside. Following the issue of the writ he applied for an order to stay the auction sale. This was granted on usual terms as regards damage.

The respondent/chargee by notice of motion dated March 6, 1972 applied for an order to strike out the appellant's statement of claim and to dismiss the action under Order 25 or under the inherent power of the court. The second defendants, the trustees, were apparently, not parties to the application. One of the grounds for the application is that the respondent/chargee has no notice of the trust constructive or otherwise. She maintains that the charge was good and effective and that she has acquired an indefeasible interest in the land which under the Land Code cannot be defeated except for fraud. This can be set up as a defence to the action. But we do not think it can be made a ground for dismissing the action at this stage of the proceedings. So we pass on to another ground which is that the appellant's claim is frivolous and vexatious.

In the affidavit filed on behalf of the respondent/chargee it is stated, *inter alia*, that the appellant not being a party to the loan transaction and to the originating summons has no *locus standi* or has no right of action and cannot, therefore, plead the Moneylender's Ordinance to invalidate the transaction or proceedings between the respondent/chargee and the trustees. The appellant is undoubtedly a beneficiary of the trust properties and, therefore, has an interest in them. In certain circumstances he may have a right to intervene in any proceedings between the trustees and a third party in order to protect his interest. That is to say he may apply to the court for an order to intervene. Even if he has not done so he may by action ask for a declaration that the trustees have misused their powers and, therefore, seek to be compensated by them for the loss of his interest. He has not done any of these things. His action was aimed solely at invalidating the loan transaction on two grounds, namely, the trustees have no power to charge the trust property, or, alternatively that the respondent/chargee's claim against the trustees is unenforceable under the Moneylender's Ordinance.

On the question whether or not the trustees have power to charge the trust property, this is no longer in doubt for there is such power under the Trust Deed. As we understand Mr. Thomas, counsel for the appellant, he was no longer relying on this ground.

As for the alternative ground it is clear that in the circumstances of this case the appellant has no *locus stundi* or no right to plead the Moneylender's Ordinance inasmuch as he was not a party to the loan transaction or to the Originating Summons. He is a complete stranger. In that context his action was plainly vexatious and frivolous.

The order of sale of the High Court obtained by the respondent/chargee is a final order. The trustees could appeal to the Federal Court of Appeal to have it set aside if they so wished. We do not think they can go back to the High Court to get it set aside simply because they have since discovered that the chargee's claim is unenforceable under the Moneylender's Ordinance. For the same reason we do not think the appellant who is a complete stranger can be permitted to do what the trustees cannot do.

Order accordingly.

Solicitors: *Thomas & Co; Ee, Lim, Tai & Leong.*

MAHMOOD v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Yong J.) December 20, 1973]

[Kuala Lumpur — Civil Suit No. 12 of 1969]

Tort — Negligent shooting — Police officer shooting at person running away from scene of suspected offence — Justification — Reasonable suspicion — Powers of police in effecting arrest — Criminal Procedure Code, (F.M.S. Cap. 6), ss. 15 and 23(1).

In this case the plaintiff alleged that he was unlawfully and negligently shot at and wounded by a police officer while he was at the Lake Gardens. The defence was that when the police officer fired the shots he was lawfully discharging his police duties to prevent the plaintiff from escaping from the scene where an offence was reasonably suspected to have been committed.

Held: (1) on the evidence the plaintiff had failed to prove his allegations that he had been shot by the police officer negligently and without warning;

(2) in the circumstances the police officer was not negligent and was justified as a last resort to fire the shot to effect the plaintiff's arrest and prevent him from escaping.

Cases referred to:-

(1) *Queen* v. *Prutab Chowkeedar*, Sutherland Weekly Reporter vol. 2 p. 9.

(2) *Mahadeo Ria & Ors.* v. *Emperor* A.I.R. 1924 All 201.

(3) *Romesh Chandra* v. *Emperor* A.I.R. 1914 Cal. 456.

CIVIL SUIT.

Edmond Lxo for the plaintiff.

Abdul Razak bin Dato Abu Samah (Senior Federal Counsel) for the defendants.